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09/916,611	07/27/2001	Greg Volgas	HCC-011 (306*142)	8709
23416 7590 08/17/2010 CONNOLLY BOVE LODGE & HUTZ, LLP P O BOX 2207 WILMINGTON, DE 19899				
EXAMINER				
PRYOR, ALTON NATHANIEL				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/916,611  
Filing Date: July 27, 2001  
Appellant(s): VOLGAS ET AL.

\_\_\_\_\_  
Ashley I. Pezzner  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 6/29/09 appealing from the Office action  
mailed 1/29/09.

**(1) Real Party in Interest**

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The following is a list of claims that are rejected and pending in the application:

Claims 1,3-18,20-28,3—39,41-48,50-65,82-85,87,89 and 91.

**(4) Status of Amendments After Final**

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

**(5) Summary of Claimed Subject Matter**

The examiner has no comment on the summary of claimed subject matter contained in the brief.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

#### **(7) Claims Appendix**

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

#### **(8) Evidence Relied Upon**

5,558,806	POLICELLO ET AL	9-1996
5,078,782	NIELSEN ET AL.	1-1992

For the above reasons, it is believed that the rejections should be sustained.

#### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1,3-18,20-28,30-39,41-48,50-65,82-85,87,89 and 91 are rejected as being obvious over USPN 5558806 and USPN 5078782. USPN '806 teaches a composition comprising acid pesticides such as 2,4-D, dicamba, triclopyr, picloram or copyralid and a surfactant blend comprising a polyalkyleneoxide polysiloxane and an organic compound such as block copolymers of ethylene oxide and propylene oxide, polyethylene oxide, mono-polyglucoside, alcohol alkoxyate, phosphate ester, ethoxy sulfate, etc. and optionally a crop oil concentrate, i.e., mineral oil or methylated soybean oil. See abstract, column 2 lines 21 – column 4 line 27, column 6 lines 26-42, column 9 line 52 – column 10 line 2, Example 4. USPN '806 discloses that the concentration of the pesticide active ingredient ranges from about 2 to about 75% by weight of the composition and preferably ranges in an amount of from about 4 to about 40%. USPN '806 teaches that the weight ratio of pesticide to surfactant blend ranges from about 1:99 to about 99:1 and ranges preferably from about 40:60 to about 60:40. See column 9 lines 19-23,32-36. The '806 patent teaches a surfactant such as octyl alcohol ethoxylate (alcohol alkoxyate) can be added to the composition. The alcohol alkoxyate surfactant is recited in the instant claims. The '806 patent is silent to the amount of octyl alcohol ethoxylate and therefore silent to the ratio of acid herbicide to octyl alcohol alkoxyate. In the absence of unexpected results, it would have been obvious to one having ordinary skill in the art to determine the optimum amount and ratios of ingredients in order to produce a stable and effective composition. See column 3 line 38 – column 6 line 43. USPN '806 does not teach the instant invention comprising the ester

of 2,4-D and an aromatic solvent. However, USPN '782 teaches pesticidal concentrates comprising 1-55% by weight of pesticides such as the ester of 2,4-D, dichlorprop or MCPA, 20-90% by weight of the oily surfactants such as mineral oil, spindle oil and vegetable oils (soy oil, rape seed oil, olive oil) and 1-45% by weight of a surfactant such as block polymers of ethylene and propylene oxide, polyalcohol, ethoxylated, propoxylated and co-ethoxylated/propoxylated polyalcohols, etc. plus aromatic solvents. See column 12 lines 14-22, column 10 lines 7-30, and column 8 lines 3-37. It would have been obvious to one having ordinary skill in the art to combine the compositions taught in USPN '806 and '782 to arrive at an invention comprising 2,4-D, ester of 2,4-D, a mineral oil or methylated soybean oil, a polyalkyleneoxide polysiloxane and an aromatic solvent. It would have been obvious to for one try this combination since both individual patents teach the same utility.

#### **(10) Response to Argument**

Appellants further argue that the Examiner does not address where the prior art teaches the acid herbicide being fully dissolved in the surfactant which is a requirement of the present claims. The Examiner reiterates that Policello teaches the combinations of acid pesticide to surfactant ranging from 40:60 to 60:40. See column 9 lines 19-23, 32-36. For this reason, the herbicide would have dissolved in the surfactant being that the claimed range of herbicide to surfactant is covered by the Policello. The Examiner does not find it necessary to provide dissolution evidence since both the instant invention and prior art invention make claim to the same ratio of herbicide to surfactant. Note, the same combination of ingredients disclosed in the prior art would

automatically yield the same result as the combination claimed because both inventions contain the same combination of ingredients. Applicants argue that none of the examples disclosed in Policello disclose the use of a herbicide in acid form. The Examiner argues that Policello is not required to exemplify all embodiments disclosed therein in order to render the instant invention obvious. At column 9 lines 25-25 of Policello it is clearly suggested that herbicides can be in acid form.

Appellants argue that Policello teaches the use of siloxane surfactant which has been deleted from the instant claims. For this reason, Appellants state that Policello does not read on instantly claimed surfactants. The Examiner argues that surfactants serve essentially the same purpose, i.e. surfactants enhance shelf life, spreading and/or dilution. This being so the Examiner maintains that Appellants provide no data to show that instantly claimed surfactants would give unobvious results over the siloxane surfactant deleted from the original claims. The fact that Appellants once make claim to the siloxane surfactant would suggest that other surfactants claim therewith would provide similar results for the instant invention absent a showing of unexpected results for the other claimed surfactants over the siloxane surfactant. In addition, the instant claims employ "consisting essentially of" language which does not exclude the use of the siloxane surfactant.

The Appellants argue that the polysiloxane (silicone based) surfactant disclosed by Policello is unstable in acidic conditions, below pH 5. The Appellants direct the Examiner's attention to USPN 6300283 to support the instability of the instant polysiloxane at acidic pH. The Appellants state, "While not specifically disclosed in the

in the applicant's application, the compositions the applicant describes have pH ranges generally well below 5.0." The Appellants refer the Examiner's attention to a Declaration and ASTM Publication STP 1234 filed 5/13/08 to support the instability of the polysiloxane at low pH. The Examiner argues that a pH requirement is not specified in the claims.

Appellants argue that Policello does not teach anything about 2,4-D in acid form with a surfactant. Assuming that Policello teaches something about 2,4-D acid, there is still no motivation to omit solvent. The Examiner reiterates that Policello does teach a combination of 2,4-D in acid form with a surfactant. See abstract, column 2 lines 21 – column 4 line 27, column 6 lines 26-42, column 9 line 52 – column 10 line 2, Example 4. The claims employ consisting essentially of language which does not necessarily omit solvent. For this reason Policello would not be required to omit solvent.

Appellants argue that the Declaration by J. Roberts points out that silicone surfactants according to Policello are unstable in the inherent acidic conditions. The acid herbicide would not dissolve in the silicone surfactant. Appellants argue that the Declaration of Roberts filed 5/13/08 and the USPN '283 were used to demonstrate that Policello did not consider using the acid form of the herbicide. The acid herbicide would not fully dissolve in the silicone surfactant according to Policello, without significant degradation of the silicon surfactant. The Examiner argues that Policello teaches that the weight ratio of acid pesticide to surfactant blend ranges from ranges preferably from about 40:60 to about 60:40. See column 9 lines 19-23,32-36. Also note that the Declaration only provides data for the composition comprising 85% of a C11 alcohol



with 3 moles of ethylene oxide and 15% 2,4-D acid. The results show that the 15% 2,4-D is fully soluble in 85% surfactant. The claims are much broader than the scope of the unexpected result. The surfactant, 85% of a C11 alcohol with 3 moles of ethylene oxide, is not specifically claimed. The 2,4-D acid is the only tested. The amount of surfactant present is 85% which is much greater than the 15% of 2,4-D acid used. However, the claim recites that the amount of acid pesticide and surfactant can be present in equal amounts. USPN '283 suggest the that the silicone surfactant used in Policello would be stable at acidic pH ranging from 5 to 6.9. Appellants provide no data demonstrating that the scope to the acid herbicides claimed would not be soluble in the silicone surfactants of Policello.

Appellants point out that prior art documents AF-300 and Weedone 638 disclose a surfactant in combination with 2,4-D acid. In addition, the Appellants point out that the documents do not teach or suggest the use of a higher level of the surfactant to dissolve the 2,4-D acid. The Appellants also point to other sources: Formulation Science, Pesticides and Formulation Technology and Auxiliaries for agrochemical formulations, to show that emulsifiers (surfactants) are not used as solvents. Appellants further argue that the Examiner does not address where the prior art teaches the acid herbicide being fully dissolved in the surfactant which is a requirement of the present claims. The Examiner reiterates that Policello teaches combinations acid pesticides to surfactant ranging from 40:60 to 60:40. See column 9 lines 19-23,32-36. For this reason, the herbicide would have dissolved in the surfactant being that the claimed range of herbicide to surfactant is covered by the prior art cited. No evidence is

necessary since both the instant invention and prior art invention make claim to the same ratio of herbicide to surfactant. Note, the same combination of ingredients disclosed in the prior art would automatically yield the same result as the composition in the claims when both inventions contain the same combination of ingredients.

The Appellants argue that Policello acknowledges 2,4-D and dicamba are in a laundry list of pesticides at column 6, line 25 – column 8, line 53. Appellants do not believe that Policello intended to dissolve 2,4-D in acid form or dicamba in acid form in the silicon surfactants of Policello. The Examiner reiterates that Policello teaches combinations of acid pesticides to surfactant ranging from 40:60 to 60:40. See column 9 lines 19-23,32-36. Policello does not have to preferably teach or exemplify the use of 2,4-D acid or dicamba acid in order to render the invention obvious. Policello does suggest the use of 2,4-D acid or dicamba acid by their mere in Policello's disclosure (column 6 lines 25-35) which makes the instant combination of 2,4-D acid or dicamba acid and silicon surfactant obvious.

Respectfully submitted,

/Alton N. Pryor/

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